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## RULES, STANDARDS, AND THE BATTLE OF THE FORMS: A REASSESSMENT OF § 2-207

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**B**UYERS and sellers of commercial goods sometimes bargain only on basic matters such as price and delivery date, and leave the details of the transaction, including warranties and arbitration provisions, to standardized term in preprinted forms. The buyer's and seller's forms do not coincide, and may even contradict one another, creating two types of disputes for courts to resolve. First, one party may seek to renege on the deal before performance and may point to inconsistencies between the purchase order and the acknowledgment to show that the minds of the parties never met clearly enough to form a contract.<sup>1</sup> In such a case, a court fac-

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<sup>1</sup> For example, a maker of gaskets orders 100 pounds of rubber and uses a purchase order drafted by its lawyer. The order form might be silent on the warranty question, or it might say that "Seller warrants goods suitable for use in the manufacture of gaskets." The rubber manufacturer, in return, sends an acknowledgment form that disclaims all warranties, including the implied warranty of merchantability (U.C.C. § 2-314) and the implied warranty of fitness for a particular purpose (U.C.C. § 2-315). The parties explicitly agree on a delivery date six months in the future. After the exchange of forms but before delivery, a sudden worldwide shortage of rubber causes the price of the commodity to triple. Seller then tries to avoid selling to the gasket manufacturer at the now bargain price. He asserts that no contract exists between the parties because his form and that of the buyer disagree on the issue of warranty.

The practicing commercial lawyer frequently confronts a client that has exchanged forms

ing disagreement between two printed forms must decide whether a contract even exists. Second, after the seller has sent the goods or the buyer has used them, the parties may fall into dispute over a term on which the forms failed to agree.<sup>2</sup> In these cases where the parties have already performed, the court must supply a term that the parties never agreed on; the court may have to decide, for example, which party will bear the loss resulting from a defect in

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and wants to know whether it is bound. Yet few disputes of this type arising under the Code are reported. There are two possible explanations. First, even a sudden shift in market price, such as occurred with cotton in 1973, might result in a potential gain or loss to a party of only a few thousand dollars. This difference may not be enough to justify litigating a case to the point where there is a reported decision. But see *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249 (10th Cir. 1976); *Hohenberg Bros. Co. v. Killebrew*, 505 F.2d 643 (5th Cir. 1974). Even if a party thought it had a right to renege on a deal because of terms buried in fine print, as long as the stakes were not high it might decline to do so because such behavior might be seen as sharp practice and hurt its reputation among other customers. Second, the outcome of these cases—the finding that a contract does exist—is clear under the Code. A court has even found a contract after an exchange of documents when the dispute was over a term in one of the forms that would have changed the price by 30%. *Columbia Broadcasting System v. Auburn Plastics, Inc.*, 67 A.D.2d 811, 413 N.Y.S.2d 50 (1979).

Though in principle battles of the forms might arise in consumer transactions, such cases are rare. We assume throughout this article that the parties involved are merchants, and thus that the special concerns that arise when a consumer is a party are not present.

<sup>2</sup> This type of case is litigated much more frequently than the first. Most of the disputes involve a warranty disclaimer in one of the forms, see, e.g., *Rite Fabrics, Inc. v. Stafford-Higgins, Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, — Ind. App. —, 380 N.E.2d 571 (1978), or a term in one of the forms mandating arbitration in the event of a dispute, see, e.g., *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978). Cases have arisen in which one of the forms included an indemnity clause, *Furtado v. Woburn Mach. Co.*, 19 U.C.C. Rep. Serv. (Callaghan) 760, 768 (Mass. Super. Ct. 1976); in which a form required the other party to pay attorneys' fees in the event of litigation, *Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co.*, 592 F.2d 1144 (10th Cir. 1979); and in which one of the forms sought to set New York as the jurisdiction in which any disputes would be litigated, *National Mach. Exch., Inc. v. Peninsular Equip. Corp.*, 106 Misc. 2d 458, 431 N.Y.S.2d 948 (Sup. Ct. 1980). All these clauses have been found to be "material" (thus materially altering the contract), as have those in most recent cases involving disclaimers and arbitration under U.C.C. § 2-207(2), see *infra* note 73 and accompanying text.

*Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), was the first reported decision under 2-207, and its facts were prototypical of the second type of battle of the forms dispute. The buyer ordered a drum of glue from the seller, stating that it needed the glue for "wet pack spinach bags." The seller, however, acknowledged the order with a form that bore the conspicuous legend, "All goods sold without warranties, express or implied." In smaller type, the seller purported to limit its liability to replacement of any glue that proved defective. The glue subsequently failed to adhere, a large amount of spinach apparently perished, and the buyer sought to impose this loss on the seller.

the goods or whether the dispute will go to arbitration.<sup>3</sup> Each of these two types of disputes is commonly called a "battle of the forms."

These disputes arise only when the parties do not explicitly dicker over the terms at issue. Thus, the law cannot resolve the battle of the forms with a simple inquiry into the parties' intent.<sup>4</sup> It is useless to ask what terms the parties intended to govern this transaction.<sup>5</sup> The buyer and seller were content to leave their mutual rights uncertain, because greater certainty would have come only with negotiations, the cost of which probably would have exceeded the expected cost of leaving things open to dispute.

The law cannot avoid choosing among terms that the parties never explicitly agreed on; any approach to the battle of the forms that allows each party to insist on its own contract terms is doomed to failure. If, for example, the buyer wants a warranty on the goods and the seller does not, the lawmaker has several choices. A rule could say that the buyer wins, that the seller wins, that the first party to send its form wins, or that the last party to

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<sup>3</sup> A court cannot dodge the issue in such situations by asserting that no contract was ever formed despite performance. However the court characterizes its decision, it supplies the missing term. Once the court decides that no contract exists, it still must decide whether the buyer should pay for the goods it used and whether it must return the goods it has not used. Supplying a term is the same as deciding the relative rights and obligations of the parties, and this much the court is obliged to do once it has jurisdiction over the dispute.

<sup>4</sup> Dean Murray forcefully argues that battle of the forms disputes can and should be determined by referring to the "bargain-in-fact" of the parties. See Murray, Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability, 39 U. Pitt. L. Rev. 597, 601-02 (1978). Our point of difference with Dean Murray is not that the inquiry he thinks courts should engage in is necessarily the wrong one, but rather that it is a necessarily imprecise one. See *infra* text accompanying note 60.

<sup>5</sup> It is also of limited value even to have a legal rule that determines whether a contract exists by focusing exclusively on the parties' intent. The intent of the parties may not be independent of the legal rule. As is true in many areas of the law, when parties do reflect on the legal consequences of their acts, their expectations depend in some measure on what they assume the legal rule to be. If, for example, as a matter of common knowledge, courts enforced only those contracts executed under a seal, parties would never think they had formed binding contracts unless they had used a seal. Where the rules of contract formation are less certain, the intent of the parties may be no more than their rough prediction of how the court will treat their exchange.

This, of course, is not to say that noncontractual elements are not of great importance. See Macanlay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963). More recent empirical work, however, suggests that parties are aware of the legal consequences of documents that differ. See Beale & Dugdale, Contracts Between Businessmen: Planning and the Use of Contractual Remedies, 2 Brit. J. L. & Soc'y 45, 50 (1975).

send its form wins. No rule of law, however, can allow both parties to prevail. Likewise, a rule that purports to enforce one party's clause saying "My terms govern or there is no deal" cannot resolve the many cases where both parties have such a clause and the deal has already gone through.

This article joins an extensive literature examining the Uniform Commercial Code's response to the battle of the forms—U.C.C. § 2-207.<sup>6</sup> The conventional wisdom of the commentators on 2-207 runs roughly as follows: The drafters of 2-207 had the salutary, indeed the unexceptionable purpose of overcoming the rigidity of one of the oldest and most mechanical common-law rules of offer and acceptance—the mirror-image rule. The commentators argue, however, that serious drafting errors,<sup>7</sup> compounded by occasional

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\* U.C.C. § 2-207 (1978). In addition to Dean Murray's contributions, see Murray, *supra* note 4; Murray, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60*, *Restatement of Contracts*, 37 *Fordham L. Rev.* 317 (1969), the commentary of commercial law scholars includes the relevant section from Professors White's and Summers' hornbook, J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 1-2, at 24-39 (2d ed. 1980), and the discussion of 2-207 in 3 R. Duesenberg & L. King, *Sales & Bulk Transfers under the Uniform Commercial Code* §§ 3.01-.09 (1980). Articles on 2-207 include Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 *Clev. St. L. Rev.* 171 (1975); Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 *Bus. Law.* 75 (1963); Hawkland, *Major Changes under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 *Prac. Law.* 73 (May 1964); Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 *Bus. Law.* 789 (1969); Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 *U. Cin. L. Rev.* 419 (1977). Student comments on the battle of the forms include Note, *In Defense of the Battle of Forms: Curing the "First Shot" Flaw in Section 2-207 of the Uniform Commercial Code*, 49 *Notre Dame Law.* 384 (1973); Comment, *A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code from the Seller's Point of View or What's So Bad About Roto-Lith?*, 8 *Akron L. Rev.* 111 (1974); Comment, *Nonconforming Acceptances under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 *U. Chi. L. Rev.* 540 (1963). See also 76 *Harv. L. Rev.* 1481 (1963); 111 *U. Pa. L. Rev.* 132 (1962).

<sup>7</sup> Grant Gilmore, one of the drafters of the Uniform Commercial Code (though not of 2-207), said that, if anything, commentators have been too forgiving of 2-207: "[They] treat the section much too respectfully—as if it had sprung, all of a piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and comment—to which various hands—Llewellyn, Honnold, Braucher and my anonymous hack—contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in the light of what 'the draftsman' 'intended.'" Letter from Grant Gilmore to Robert Summers (Sept. 10, 1980), in R. Speidel, R. Summers & J. White, *Teaching Materials on Commercial and Consumer Law* 54-55 (3d ed. 1981) [hereinafter cited as Gilmore Letter].

judicial errors, have hampered 2-207's effectiveness and contravened the drafters' purpose in a significant number of cases.<sup>8</sup> This article shows that the conventional wisdom is wrong or, at least, seriously incomplete.

We argue that 2-207 and the battle of the forms must be understood in light of a fundamental question in jurisprudence—whether to use formal “rules” or open-ended “standards” to resolve the mutual rights of private parties. The drafters of the Code intended to do more than overcome the formalist excesses of the mirror-image rule; indeed, that purpose only poorly explains the history and final language of 2-207. Instead, the drafters sought to break dramatically with traditional formal rules of offer and acceptance and, with those rules, dependence on the parties' documented expressions. The drafters sought to treat the battle of the forms with an open-textured “standard” similar to the one they applied to another recurrent problem in contract formation—the case where the parties have unquestionably contracted but have left some of the terms of their agreement incomplete.

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\* *Roto-Lith* is the 2-207 case most frequently criticized. Though recently embraced by a lower federal court in the First Circuit, *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537, 546 (D. Mass. 1977), it has been rejected in most of the jurisdictions that have considered the issues it raises. See, e.g., *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228, 1235 n.5 (7th Cir. 1977); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 & n.5 (6th Cir. 1972); *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421, 437-38 (E.D. Pa. 1975); *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 8-9 (S.D.N.Y. 1973); *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 107, 569 P.2d 751, 763, 141 Cal. Rptr. 157, 168 (1977); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, \_\_\_ Ind. App. at \_\_\_, 380 N.E.2d at 578.

As we are using the term, some cases that discuss 2-207 are not battle of the forms cases at all. In these cases, the parties exchange documents, but they advert to the differences they have rather than leave them to fine print. In these situations, the court's inquiry is simply a factual one. For example, when two parties exchange telegrams and one proposes that delivery be “FOB our truck your plant loaded,” and the other responds that he will sell only on an “as is—where is” basis, the court can decide, as a factual matter, whether the parties in the face of such a disagreement intended to do business with one another. See, e.g., *Koehring Co. v. Glowacki*, 77 Wis. 2d 497, 504-05, 253 N.W.2d 64, 67-68 (1977). Similarly, when parties have a dispute over the delivery date and the offeree adds in a handwritten note to its acceptance form that the parties will resolve their differences, one can ask as a factual matter whether the parties thought they had a contract, the details of which were unclear, or whether they were still negotiating. See, e.g., *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 502, 567 P.2d 1246, 1253 (1977).

Other cases arising under 2-207 that are not battle of the forms disputes involve explicit dickering before the exchange of documents over terms that are later the subject of dispute, or involve exchanges of forms that take place after the parties have agreed to do business with one another. See *infra* note 48.

The drafters decided, however, to put 2-207 to double-duty. They wrote the section to resolve not only battles of the forms, but also disputes in which the parties make a binding oral agreement and later disagree when they attempt to record or fine-tune the agreement through post-bargain "confirming letters." The drafters chose to resolve this type of dispute with a relatively formal rule, yet the final language of 2-207 applies the formal rule to both confirmation cases and battles of the forms. Most of the flaws that the commentators have seen in the Code's treatment of the battle of the forms stem from this intrusion of a formal rule in situations that the drafters initially intended to resolve with a flexible standard.

Nevertheless, the judicial history of 2-207 in battle of the forms cases reveals that the courts have generally overcome these flaws and have construed 2-207 consistently with the drafters' intent — though at the sacrifice of literal construction of the section's language. To determine whether a contract exists, courts in practice look at the terms that the parties expressly agreed on and then decide whether agreement on these terms shows that a contract was in the mutual interest of the parties, viewed *ex ante*. When the agreement leaves certain terms of the contract in dispute, courts supply the terms that the Code posits parties would have agreed to had they dickered over them.<sup>9</sup> We conclude then that, if one accepts the drafters' goals for 2-207, redrafting its language may be unnecessary.

We challenge, however, the assumption of many commentators<sup>10</sup>

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\* This is not to say, however, that courts always reject the fine-print terms. We include the many cases in which the court adopts the fine print in one party's form but in which these terms coincide with those the Code would supply. See *infra* text accompanying notes 73-74.

<sup>10</sup> See, e.g., Davenport, *supra* note 6, at 78 ("This, then, was the commercial reality with which the common law of offer and acceptance had not kept pace. An updating of the law to bring it into alignment with commercial practice was in order."); Taylor, *supra* note 6, at 425-26 ("The problem with this approach is twofold: the analytical legal construct of the transaction bears little resemblance to reality. In addition, it is evident that commercial practice will not change to conform with the legal construct.").

Frederick Lipman argues that the mirror-image rule might be preferable to 2-207, but thinks the mirror-image rule itself could be profitably combined with a rule similar to the one now in 2-207(3). See Lipman, *supra* note 6, at 806-07.

The mirror-image rule still survives in England. See *Butler Mach. Tool Co. v. Ex-Cell-O Corp. (England)*, [1979] 1 W.L.R. 401 (C.A. 1977). At least one commentator there urges its retention. Rawlings, *The Battle of Forms*, 42 Mod. L. Rev. 715, 721 (1979) ("[I]t seems that

that the goal of 2-207 is correct and argue that the formalist principles of offer and acceptance underlying the mirror-image rule are fundamentally sound. Commentators assume that the mirror-image rule cannot resolve the problem of the welsher satisfactorily, but the problem of the party that wants to back out of a bargain on a technicality can be handled within the framework of the mirror-image rule and does not require abandoning the very idea of a rule, as the Code's drafters intended. Perhaps more important, the mirror-image rule may yield a better result than 2-207 in the second battle of the forms problem, in which both parties have performed and a dispute exists over terms. In theory, at least, formal rules such as the mirror-image rule allow parties to a contract to avoid the off-the-rack terms the Code supplies in the absence of express agreement; such ready-made terms may be poorly suited to the transaction and consequently advance the interest of neither party. Compared with 2-207, the mirror-image rule encourages parties to adapt the terms in their forms to the needs and abilities of buyers and sellers in their particular market. Thus, we believe that a formal rule of contract formation, applied consistently in battles of the forms, may produce terms that are better suited to particular transactions than does 2-207.

### I. RULES, STANDARDS, AND THE BATTLE OF THE FORMS

The text of 2-207 at first glance seems straightforward and plausible:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

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the real strength or weakness of the traditional approach to the Battle of Forms will only be known when more research has been done into the attitudes and expectations of the beligerents involved. It is submitted that meanwhile the traditional analysis should be retained. Although that analysis suffers from certain drawbacks, it is suggested that the deficiencies of alternative solutions should preclude those solutions from adoption by the courts.").



- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.<sup>11</sup>

Moreover, most commentators find the implicit purpose of 2-207 to be quite clear: strict rules of offer and acceptance governed a battle of the forms at common law, and 2-207 is designed to overturn one of the hoariest of those rules—the mirror-image rule.<sup>12</sup> Nevertheless, most commentators also agree that 2-207 is a statutory disaster whose every word invites problems in construction.<sup>13</sup>

A few examples from subsection (1) readily suggest how many questions the drafters left unresolved. Subsection (1) tells us that “an expression of acceptance” operates as an “acceptance” even if it includes “additional” or “different” terms. Unless a responding party makes the expression of acceptance “expressly conditional,” assent to the basic tenor of an offer creates a contract, even if the responding party sets forth terms that are not in the offer or are different from the terms of the offer.<sup>14</sup> Yet at some point, an of-

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<sup>11</sup> U.C.C. § 2-207 (1978).

<sup>12</sup> See, e.g., J. White & R. Summers, *supra* note 6, § 1-2, at 25; Barron & Dunfee, *supra* note 6, at 178-79; Davenport, *supra* note 6, at 77-78. Dean Murray argues that 2-207 was only meant to prevent the mirror-image rule from operating beyond its rationale, Murray, *supra* note 4, at 601-02, and that 2-207 actually preserves the mirror-image rule in the broad sense that to create a contract the acknowledgment must agree with the offer on all dickered terms and must objectively reflect a definite intention to accept, Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 *Washington L.J.* 1, 8-9 (1981). Later in this article, we suggest that at common law the mirror-image rule typically did not operate to prevent the recognition of a contract where the parties had achieved what Dean Murray calls a “bargain-in-fact.” See *infra* notes 46-52 and accompanying text.

<sup>13</sup> Two of the most comprehensive discussions of the problems facing a court interpreting 2-207 are 3 R. Duesenberg & L. King, *supra* note 6, § 3.03, and J. White & R. Summers, *supra* note 6, § 1-2.

<sup>14</sup> See, e.g., *Columbia Broadcasting System v. Auburn Plastics, Inc.*, 67 A.D.2d 811, 413 N.Y.S.2d 50 (1979) (holding that a responding document including 30% surcharge for “engineering services” was nevertheless effective as acceptance under 2-207(1)).

feree's document, though it contains no "expressly conditional" language, may contain terms so "different" from those of the offer that the document no longer seems to be an "expression of acceptance." But how does a court or a party tell when the difference is too large?<sup>15</sup>

In any event, what does it mean to make one's "expression of acceptance" "expressly conditional"?<sup>16</sup> Is it enough to say, perhaps in fine print, "This acceptance is expressly conditional"? If it is enough, what prevents parties from always using such language? Why should such buried language control the bargain, when other, similarly buried terms do not? If, on the other hand, one reads into the section a requirement that "expressly conditional" language be obvious, two further problems emerge. First, the requirement of obviousness introduces further uncertainty and seems to make consistent application of 2-207 even more difficult. Second, it makes the section redundant. Any language that *obviously* makes an agreement conditional on the other party's consent to a particular term should keep the document from operating as an "expression of acceptance" in the first place.<sup>17</sup> These do not exhaust the

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<sup>15</sup> Perhaps a response is conditional when the difference in terms is so great as to suggest that even had the parties been free of all negotiating costs, they could not possibly have dickered their way into agreement on the unsettled term ("I will sell you the Rolls-Royce you offered to buy, but at \$100,000, not \$10,000."). See Murray, *supra* note 4, at 604. Yet what of cases where the difference in forms is less dramatic? For example, where the parties fail to agree on who will bear the cost of a defect, how does one measure whether the buyer would take the goods without a warranty (with an adjustment in price) or whether the seller would sell them with a warranty?

The courts have partly answered this last question, at least where the difference is over warranties. See, e.g., J. White & R. Summers, *supra* note 6, § 1-2, at 30. Most cases ask whether a disclaimer becomes part of the contract, but ask that question only after they decide that the documents form a contract despite the presence of a disclaimer. See, e.g., *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

<sup>16</sup> *Roto-Lith* held that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly . . . conditional on assent to the additional . . . terms.'" 297 F.2d at 500 (ellipses in original). Most cases since have declared that to be "expressly conditional," the acceptance must clearly reveal that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms. See, e.g., *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926-27 (9th Cir. 1979); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972).

<sup>17</sup> In any event, neither interpretation of the phrase "expressly conditional" explains what the terms of the contract should be if the parties fall into dispute after the goods are shipped and used. Is a document with terms that are made expressly conditional a counter-offer that is accepted, if at all, only when the goods are sent or used? Or does subsection (3)

questions left unresolved by subsection (1), and, as we note below, subsection (2) is an equally easy target for critics of statutory drafting.<sup>18</sup>

For nearly three decades, commentators have struggled to solve these problems and to reconcile their solutions with those of other commentators and with their own principles of jurisprudence.<sup>19</sup> More than one has concluded that the questions are unanswerable, and that we should abandon the present version of 2-207 and write another.<sup>20</sup> Yet however flawed the language of 2-207 may be, courts must still make the best of an admittedly bad job and interpret 2-207 as consistently as possible with the intent of the drafters. Moreover, the commentators have not critically examined the widely assumed purpose of 2-207 as a possible source of the oft-

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govern because the writings "do not establish a contract"?

In *Roto-Lith*, the court found language in the seller's form to be expressly conditional, but did not discuss the applicability of 2-207(3). 297 F.2d at 499. Subsection (3), of course, would have been irrelevant if Massachusetts had enacted the 1952 version of the Code, which did not include that subsection. Massachusetts, however, had enacted the 1957 version, which did include 2-207(3). See 1957 Mass. Acts 778 (codified at Mass. Gen. Laws Ann. ch. 106, § 2-207(3) (West 1958)). Most commentators have assumed that in the ordinary battle of the forms case, acknowledgments that fail as acceptances are not counteroffers and that subsection (3) controls. Dean Murray suggests though that the acknowledgment containing inconsistent terms ought to be treated as a genuine counteroffer that is accepted when the goods are accepted. He offers as an example the case in which seller sends the following note to buyer, who both reads and understands it:

We can ship the goods described in your order. The price and delivery terms are acceptable. However, we cannot assume the risk of the implied warranty of merchantability or other implied warranties. Moreover, we cannot subject ourselves to liability for consequential damages. Recognizing your desire to have the goods within one week, we will ship the goods within two days which should insure their arrival in accordance with your order. If you do not wish to accept the terms of this counter-offer, simply reject the goods and return the shipment to us at our cost.

Murray, *supra* note 4, at 625-26. Such cases, however, are unlikely to arise when preprinted forms are involved; in addition, the parties receiving the forms probably will not have the authority to change language in the company's form. One wonders nonetheless whether in an era of word processing the unquestioning distinction between typewritten terms and nondickered terms in fine print can persist.

<sup>18</sup> See *infra* notes 61-66 and accompanying text.

<sup>19</sup> See, e.g., J. White & R. Summers, *supra* note 6, § 1-2, at 26 ("The law as to terms must be sophisticated enough to nullify the efforts of fine-print lawyers, it must be sufficiently reliance-oriented to protect the legitimate expectations of the parties, and it must be fair and even handed."); Taylor, *supra* note 6, at 420-21 ("Nonconcurrence of operative concepts and transactional realities is revealed vividly by a current commercial practice known as the 'battle of the forms.'").

<sup>20</sup> See, e.g., Barron & Dunfee, *supra* note 6, at 206-07; Shaw, U.C.C. § 2-207: Two Alternative Proposals for Change, 13 Am. Bus. L.J. 185, 195-98 (1975).

noted difficulties in construing the section. A fresh search into the origins of 2-207<sup>21</sup> may offer a fuller understanding of the drafters' intent and demonstrate, surprisingly, that the courts have generally been true to that intent.

#### A. *The Choice Between Formal Rules and Open Standards*

The evolution from the common-law rules of offer and acceptance to 2-207 marks a major shift from formal rules to relatively unconstraining legal standards. Therefore, we begin with a brief review of how "rules" and "standards" governing private transactions differ in both principle and practice.

In establishing and applying criteria for resolving contract disputes, legislatures and courts generally try to encourage people to engage in mutually beneficial transactions. This truism simply states an end and leaves lawmakers with the difficult choice of means. On the one hand, people may feel most encouraged to transact when they have seen the judiciary carry out their wishes and intentions in particular cases. Courts and legislatures that take this view would create very general criteria that leave judges broad power to examine the circumstances of particular cases—to see whether the parties indeed struck a bargain and to identify the terms on which the parties' minds met. On the other hand, attempting to recognize the bargain-in-fact in every case might breed uncertainty about the likely outcome of contract cases and thus discourage people from entering into transactions. Lawmakers therefore might prefer to create formal rules of contract formation, and the courts might enforce these rules rigidly.

The tension between these two approaches to contract law is, of course, a tension in all jurisprudence. In most fields of law, legislatures and courts must choose between what can most usefully be called "standards" and "rules." A "standard" in this sense is a guide to conduct that announces the government's social or economic goals in regulating that conduct and that permits courts

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<sup>21</sup> Our inquiry delves back further into the drafting history than most studies of 2-207, which have begun with the hearings that followed the writing of the 1952 draft of Article 2. Professors Speidel, Summers, and White review the drafting changes in 2-207 after the promulgation of the 1952 Official Draft. See R. Speidel, R. Summers & J. White, *Teaching Materials on Commercial and Consumer Law* 42-45 (3d ed. 1981). Professor Gilmore has pointed out that review of the history before the 1952 draft would be useful. Gilmore Letter, *supra* note 7.

broad discretion in applying those goals directly in particular cases. A "rule," in contrast, is a very specifically framed guide to conduct that is detailed in its normative content and that the lawmaker believes will directly implement his social or economic goals. These categories, of course, appear terribly abstract in the face of actual legal problems. Nevertheless, numerous writers have found them useful tools of legal analysis and have compared their advantages and disadvantages by considering their theoretical bases<sup>22</sup> or by imagining their practical costs and benefits.<sup>23</sup>

Dean Murray has been perhaps the most ardent proponent of the view that Article 2 generally favors the "standards" approach. The Code, he stresses, eschews formal rules that focus on the precise language of the parties' documents.<sup>24</sup> Instead, it invites and requires courts to look to all available evidence of the parties' intent, including their course of dealing and the customs of their trade, to uncover the essential bargain-in-fact:

The *true* bargain in fact must be laid bare because only it is deserving of the legally recognized status of a "contract" between the parties—only the bargain-in-fact should be made operative by the courts.<sup>25</sup>

The true agreement, in this view, is a living organism subject to growth through modifications of the parties' expression and conduct. The formal writings are but one stage in the life of the agreement and offer only a partial description of it:

All of these . . . manifestations of the underlying philosophy of

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<sup>22</sup> See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687-1713 (1976).

<sup>23</sup> See Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Leg. Stud. 257 (1974).

Although the comparison of rules and standards has been helpful in many varied areas of the law, it has proved of special interest in areas of private transactions where formal rules can play a unique role. Any rule designed to control social or economic conduct runs the risk of being arbitrarily over- or under-inclusive. Yet where private parties have the opportunity to learn formal legal rules and organize their actions and relationships accordingly, they can mitigate the over- or under-inclusiveness of such rules and thereby participate in carrying out the legislature's goals. Kennedy, *supra* note 22, at 1697-99. This special relationship between the government and private parties in the context of formal legal rules adds particular importance to the "standards vs. rules" debate in the field of commercial contracts.

<sup>24</sup> Murray, *supra* note 4, at 597-601, 645-51. See also Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan. L. Rev. 621 (1975).

<sup>25</sup> Murray, *supra* note 4, at 647 (emphasis in original).

Article 2 (and attendant sections of Article 1) manifest the same goal: a more precise and fair identification of the actual or presumed intent of the parties.

. . . Any other goal is hostile to the nature of intention, bargain and assent. The only other possible route to fairness is the government administered contract which not only strips the "agreement" of individual freedom of choice but may well prove to be unworkable and, therefore, ultimately unfair.<sup>26</sup>

Even though the open-ended bargain-in-fact approach is obvious in such Code provisions as those governing contract formation in general<sup>27</sup> and means of offer and acceptance,<sup>28</sup> we know that the bargain-in-fact is not the alpha and omega of commercial contract law. The Code itself contemplates that judges will look to formal rules in a way that ignores an indisputable bargain-in-fact. Though the Code defines an *agreement* as the bargain of the parties in fact,<sup>29</sup> it views a *contract* as "the total legal obligation which results from the parties' agreement as affected by this Act and other applicable rules of law."<sup>30</sup> Thus, the Code takes the view that it is sometimes better to respect the formal integrity of writings than to recognize the bargain-in-fact. Under the statute of frauds, for example, a court may refuse to enforce a bargain in the face of overwhelming evidence that the parties reached agreement, simply because no adequate writing reflects that bargain.<sup>31</sup> Similarly, under the parol evidence rule, the court may ignore certain terms on which the parties agreed and instead enforce a different or more limited agreement that is incorporated into a writing.<sup>32</sup>

In theory, such rules may reduce litigation costs — which the parties do not fully bear and thus have insufficient incentive to avoid—by reducing the scope of the evidence that the parties may present at trial. Yet a fundamental value of such rules often goes unrecognized. In deliberately overlooking the fact or terms of actual agreements in certain cases, such rules promote beneficial transactions in the long-run by inducing greater certainty in the

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<sup>26</sup> *Id.* at 648-49.

<sup>27</sup> U.C.C. § 2-204 (1978).

<sup>28</sup> *Id.* § 2-206.

<sup>29</sup> *Id.* § 1-201(3).

<sup>30</sup> *Id.* § 1-201(11).

<sup>31</sup> *Id.* § 2-201.

<sup>32</sup> *Id.* § 2-202.

legal supervision of commercial contracts.

To understand better this aspect of formal legal rules, one must turn to the classic statement of the role of legal formalities in private law: Lon Fuller's article "Consideration and Form."<sup>33</sup> Fuller notes the two most widely recognized functions of legal formalities: the "cautionary" function and the "evidentiary" function.<sup>34</sup> Such rules as the statute of frauds and the parol evidence rule are "cautionary" because, by forcing parties to commit all or part of an agreement to writing, they induce the parties to contemplate carefully the practical significance and likely legal consequences of their actions.<sup>35</sup> Both rules are "evidentiary," because they help to ensure a written record on which a court can rely in making findings of fact.<sup>36</sup>

Fuller notes, however, that most analyses of legal formality<sup>37</sup> overlook one of its most important functions—what he helpfully calls the "channeling function."<sup>38</sup> A legal formality may do more than caution the parties against inadequately considered action and ensure a factual record for later litigation. By providing a formal legal vessel into which a businessman can fit his actions or intentions, the rule enables the businessman to assure himself that he has achieved an enforceable bargain; the vessel itself serves as protection against the uncertain inclinations of the courts.<sup>39</sup> A person entering into an agreement always runs the risk that a factfinder will fail to recognize the agreement that occurred or will enforce one that did not occur. A businessman wants to reduce this risk, and it may benefit him to lose the value of a bargain-in-fact in a particular case where he carelessly ignored a legal formality, if the formal approach of the court in denying him that value gives him a certain means of testing the enforceability of future bargains. A universally or systematically recognized legal form for an

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<sup>33</sup> Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799 (1941). For a listing of authorities discussing the rationale of legal formalities, see *id.* at 800 n.4.

<sup>34</sup> *Id.* at 800.

<sup>35</sup> See *id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 801.

<sup>38</sup> *Id.* Fuller notes that "[i]n all legal systems the effort is to find definite marks which shall at once include the promises which ought to be enforceable, exclude those which ought not to be, and signalize those which will be." *Id.* at 801 n.5 (quoting Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 *Yale L.J.* 704, 738 (1931)).

<sup>39</sup> *Id.* at 801-02.

intention to contract assures the party that his intent will be respected and thus encourages him to enter into contracts in the future.<sup>40</sup>

Because they may cause courts to overlook the bargain-in-fact and because they are inevitably over- or under-broad, formal rules have been fairly suspect in contemporary contract law. Yet Fuller's idea of the channeling function clarifies the purpose and value of contract formalities. Although formal rules may ignore the bargain-in-fact in particular cases, adherence to such rules furthers the goal of promoting mutually beneficial transactions—a goal that proponents of the bargain-in-fact view presumably share. Because contracting parties have a strong incentive to order their transactions to conform to the specific rules, the parties themselves can mitigate the apparent imprecision of these rules.<sup>41</sup>

### *B. The Mirror-Image Rule and the Battle of the Forms*

As conceived in conventional legal history, the mirror-image rule was a paradigm of legal formality that worked roughly as follows in battle of the forms cases. One of the parties would send an offer, often in the form of a purchase order. If the other party sent a

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<sup>40</sup> As Fuller notes, the most fundamental of such forms is language itself. *Id.* at 802. Regardless of any requirement of a writing, a party must commit his intention to recognizable words and, if he does so, he improves the chance that a court will enforce that intention. Language is perhaps the least arbitrary of legal forms, since the words chosen to "channel" intention to form a contract will bear a natural descriptive relationship to contractual intention. In contrast, the seal—perhaps the best example of a traditional channeling formality—may bear no descriptive relationship to intention to contract, except in the most strained metaphoric sense. Yet once lawmakers declare that a seal signifies the intention to make a contract, a party knows that courts will recognize all sealed agreements and reject all unsealed agreements.

Fuller properly notes that the channeling function usually overlaps with the cautionary and evidentiary functions. *Id.* at 804. A rule that performs one function will usually perform the others. Nevertheless the distinction is important. It serves an historical purpose, since a rule poorly explained by one function may be readily explained by the others. Precisely because placing a seal on paper is not a natural expression of intent to contract, the seal does not make much sense as an evidentiary tool—except circularly—but it makes a great deal of sense as a cautionary or channeling tool. More important, the distinction among the functions becomes crucial in borderline cases, which may be decided by the court's preference for one function over another. *Id.* The court may not be concerned about enhancing the cautionary function of a formal rule among practiced merchants whom we presume to be cautious in entering into contracts; yet the court may want to enforce a formality because its channeling value will enhance commerce.

<sup>41</sup> See *supra* note 22.



document in response, that document had to mirror the terms of the offer exactly. Otherwise, despite its general tenor of acceptance, it would not be an acceptance, but rather a counteroffer. Because preprinted forms rarely coincided, the exchange of forms would fail to create a contract, and neither party would be bound before performance. If the parties did perform, the original offeror in the transaction would be deemed to have accepted the terms of the counteroffer when (as seller) it shipped the goods or when (as buyer) it accepted delivery.<sup>42</sup>

According to most critics, the sole virtue of this rule was its certainty.<sup>43</sup> Because a contract existed only when the forms exactly coincided, courts could easily decide when a contract existed and when it did not. This virtue, however, was inseparable from the rule's principal vice: arbitrary and formalistic decisions. The critics charge that courts, pointing to trivial differences in the documents, would routinely find that no contract existed and thus would allow the party responding to the offer to back out of a deal that the offeror might reasonably have assumed to be binding. Where the parties had performed, the critics charged, the courts would bind the original offeror to terms buried in the fine print of the ac-

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<sup>42</sup> Williston discusses the mirror-image rule in these terms. See 1 S. Williston, *The Law of Contracts* § 73, at 128 (1st ed. 1920). He wrote that:

In order to make a bargain it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. . . . If a promise is requested that promise must be made absolutely and unqualifiedly. This does not mean necessarily that the precise words of the requested promise must be repeated, but by a positive and unqualified assent to the proposal the acceptor must in effect agree to make precisely the promise requested; and if any provision is added to which the offeror did not assent, the consequence is not merely that this provision is not binding and that no contract is formed; but that the offer is rejected.

*Id.* (footnotes omitted). Some of the commentators who have discussed the mirror-image rule since include 3 R. Duesenberg & L. King, *supra* note 6, § 3.02; R. Nordstrom, *Handbook of the Law of Sales* § 36, at 92-93 (1970); Barron & Dunfee, *supra* note 6, at 175-76; Davenport, *supra* note 6, at 76-78.

<sup>43</sup> The following critique is typical:

The alleged virtue of the mirror image rule was that it promoted greater certainty between the parties. . . . The assumption on which this theory was based had to be that both parties were aware, not only of each and every term in the [sic] other party's offer or acceptance, but of each and every term contained in their own offer or acceptance. While such certainty might have been attainable in a time when commercial contracts were personally negotiated and original documents created for each transaction, it is not difficult to see that the complexity and needs of the modern commercial transaction made such knowledge virtually impossible.

Barron & Dunfee, *supra* note 6, at 176.

knowledge (i.e., the "counter-offer"). The courts thereby established an arbitrary rule that the acknowledgment, or "last shot," in a battle of the forms would always win.<sup>44</sup> The application of the mirror-image rule to this second type of battle of the forms problem was subject to less attention than the first, however. Under 2-207, it has proved the more common sort of dispute, yet critics of the mirror-image rule only mention it as an afterthought. Instead, they focus their attention on cases in which, before performance, courts used the mirror-image rule to find that no contract existed.<sup>45</sup>

Although the common-law courts might have applied the mirror-image rule mechanically in these situations to permit welshing, the simple historical truth is that they did not.<sup>46</sup> When a party sought

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<sup>44</sup> See, e.g., *Garst v. Harris*, 177 Mass. 72, 58 N.E. 174 (1900) (Holmes, C.J.).

<sup>45</sup> See, e.g., *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915), which held that a seller's acknowledgment of the buyer's original offer was not an acceptance because the buyer's subsequent confirmation of the order included a clause requiring that seller acknowledge the order. Thus, the contract failed because seller never acknowledged receipt of the later form. See *infra* note 52.

<sup>46</sup> Some critics of the mirror-image rule note that it did have exceptions. See, e.g., *Barron & Dunfee*, *supra* note 6, at 175 & n.15 ("While not all courts felt comfortable with such a strict formulation and some sought fictions to avoid its application, by and large the requirement was rigidly enforced." (footnotes omitted)). These authors cited two exceptions in particular: (1) insertion of a term which would have been implied in fact from the offer, and (2) stipulations in conformity with trade usage. *Id.* See also *Davenport*, *supra* note 6, at 77 ("Two exceptions did serve, however, to mitigate the rigor of the rule. One was that a variance in the acceptance implied in any event by law did not alter the offer. Another was that the variance was frequently disregarded if it was not raised initially as grounds for refusal to perform and therefore under the circumstances clearly evidencing its afterthought character as that of a party trying to escape the consequences of a contract on any available ground whatever." (footnotes omitted)); *Lipman*, *supra* note 6, at 791-92 (noting that courts generally found exceptions to the mirror-image rule in the following circumstances: "(1) parol evidence in the form of trade usages or other facts might be used to explain an apparent variance; (2) if the purported acceptance stated only the legal implications of the offer; (3) if the purported acceptance [sic] contained only a request or other precatory language; (4) if the variance was immaterial." (footnotes omitted)); Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, *supra* note 6, at 541 n.5 (listing cases where rule is not applied, but asserting that these are "of course" in the minority).

The commentators have not recognized that when all these exceptions are taken together, much of the bite of the mirror-image rule is lost. One suspects that in its rigid form, the mirror-image rule existed only in the treatises and hornbooks. One can doubt whether it even took firm hold in New York after *Poel*. See, e.g., *Orr v. Doubleday, Page & Co.*, 223 N.Y. 334, 338-40, 119 N.E. 552, 553 (1918) (exercise of an option to renew lease "complete and absolute" despite request for acknowledgment). A closer examination of the lists of mirror-image cases that Williston and Corbin provide in their treatises shows that cases in

to escape from a deal by pointing to discrepancies between offer and acceptance, common-law courts usually were unsympathetic. They often asserted that a purported acceptance became a counteroffer only if differences between it and the offer were "substantial."<sup>47</sup> They were quick to cite the rule of "*de minimis non curat lex*" and other maxims and equitable principles if the party seeking to avoid contractual obligations complained of the discrepancy only to escape from a bad bargain,<sup>48</sup> especially if the party first complained after litigation had already arisen. The courts could also assert that different terms in the acceptance were implicit in the offer anyway because of trade usage or the particular circumstances of the transaction.<sup>49</sup> Finally, courts could characterize dis-

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which a trivial term was used successfully to welsh on deals were rare. Even in these cases, the contract in question often is not typical of those ordinarily used in the trade.

<sup>47</sup> See, e.g., *Propstra v. Dyer*, 189 F.2d 810, 812 (2d Cir. 1951) (where offer gave delivery as "latter part of September or early October" it would be "highly artificial" to construe an answer of "October sellers option" as a counteroffer); *Newspaper Readers Serv., Inc. v. Canonsburg Pottery Co.*, 146 F.2d 963, 965 (3d Cir. 1945) (discrepancy as to what date delivery would start and whether some pieces would be sent early for advertising purposes not so material as to preclude finding a contract); *Glickstein & Terner, Inc. v. Sheffield Glass Bottle Co.*, 214 A.D. 626, 627, 212 N.Y.S. 444, 445 (1925) ("mild doubt" in acceptance that seller would not make shipments on dates specified did not affect validity of acceptance); *Barteldes Seed Co. v. Fox*, 134 Okla. 248, 250, 273 P. 258, 260 (1928) (acceptance of order for two types of seed where buyer actually ordered only one binding for the one agreed upon; acceptance not made conditional because immaterial words added); *Kaw City Mill & Elevator Co. v. Purcell Mill & Elevator Co.*, 19 Okla. 357, 358, 91 P. 1022, 1023 (1907) (contract formed through exchange of telegrams though buyer and seller differed on the city from which freight would be charged).

<sup>48</sup> See, e.g., *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 235-36 (1925) (after price of sugar dropped, buyer asserted no contract existed; court deemed one difference a "quibble," and harmonized the others: "Not until this action was brought was a variance suggested. In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments."); *Washington Elec. Coop., Inc. v. Norry Elec. Corp.*, 193 F.2d 412, 414 (2d Cir. 1951) (buyer's acceptance of a contract for diesel generators required balance to be paid before shipment by common carrier; offer had stated balance in two weeks, shipment by truck; objections over differing terms held apparent afterthoughts); *Milliken-Tomlinson Co. v. American Sugar Ref. Co.*, 9 F.2d 809, 813-14 (1st Cir. 1925) (acceptance added payment terms and delivery option, and deleted some phrases in offer; court found no material difference, citing *Small*); *Shane Bros. & Wilson Co. v. Striglos*, 228 Ill. App. 397, 401 (1923) (clause making acceptance subject to delay because of strikes did not make the acceptance conditional and thus a counteroffer, because defendant had made no objection and treated the agreement as settled.); *Procter & Gamble Co. v. Emerman*, 191 Ill. App. 530, 534-35 (1915) (contract formed though acceptance added that delivery must be in box cars).

<sup>49</sup> See, e.g., *Northern Produce Exch. v. Ablon*, 169 Ill. App. 633, 637-38 (1912) (addition of inspection term was custom of trade, so did not prevent formation of contract); *Brown v.*

crepancies in the responsive document as "a request for a change or addition" that did not prevent the document from being an acceptance.<sup>50</sup>

When courts used the mirror-image rule to hold that a contract did not exist, the results rarely seemed arbitrary. For example, the exchange of documents might have left significant terms unsettled, such as the delivery date for goods in a volatile market.<sup>51</sup> Courts were unwilling to speculate whether parties would have come to terms, had they had the chance to dicker over their differences. Yet this unwillingness to speculate is very different from the rigid posture of which the courts frequently have been accused.<sup>52</sup>

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Norton, 2 N.Y.S. 869, 870-71 (Sup. Ct. 1888) (seller's acceptance, promising to deliver 24,000 blue Welsh firebricks provided that site of delivery would be nearby dock; held, no addition to the contract, because goods were arriving from overseas so that it was implicit that they would arrive on dock); Calumet Ref. Co. v. Star Lubricating Co., 64 Utah 358, 362, 230 P. 1028, 1029 (1924) (addition of payment terms not considered a conditional acceptance, because terms were customary in the trade). One should note, however, that these cases and many other common-law cases, like their modern counterparts, are imperfect authorities, because few are classic battle of the forms disputes in the sense in which that term is used today. See *supra* note 8.

<sup>50</sup> Williston noted that "[f]requently an offeree while making a positive acceptance of the offer, adds as a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed." 1 S. Williston, *supra* note 42, § 79, at 138 (footnote omitted). Courts took advantage of this freedom to characterize a discrepancy between documents as a "proposal."

<sup>51</sup> See, e.g., *El Reno Wholesale Grocery Co. v. Stocking*, 293 Ill. 494, 503, 127 N.E. 642, 645-46 (1920). Like many other cases cited as examples of the mirror-image rule, this case may have been decided on alternate grounds.

<sup>52</sup> Critics rely too much on *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915). The decision is altogether exceptional in its rigid application of the mirror-image rule and, in any event, is not so clearly wrong as almost all have readily concluded. The buyer in *Poel* had corresponded with the seller for shipment of 12 tons of "Upriver Fine Para Rubber" and filled in a preprinted form with the price and delivery terms the seller had quoted. The form, aside from blanks for the order, stated only the following:

CONDITIONS ON WHICH ABOVE ORDER IS GIVEN

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.

Terms: F.O.B.

*Id.* at 316-17, 110 N.E. at 621. The court concluded that the buyer had made its acceptance of the deal conditional on seller's acknowledgment of its document and was therefore postponing the moment the contract arose until the seller complied with the condition. It was as if the buyer had said, "Until you acknowledge this document, there is no deal." *Id.* at 319,

Even assuming that *some* legislation was needed to prevent courts from deciding contract disputes too inflexibly, however, a statute as complex and troublesome as 2-207 was entirely unnecessary. To keep a welsher from using a technicality to renege on a deal, a statute could have said:

An expression of definitive acceptance in substance, accompanied by additional terms, shall be construed, in case of doubt, as constituting an acceptance accompanied by an offer of a modification which the other party is free to accept or reject.<sup>53</sup>

This provision, taken from a draft of the Revised Uniform Sales Act (RUSA) written in the early 1940's, would have made it easier for a court to reject a merely technical challenge to the existence of a contract.<sup>54</sup> Although the phrase "definitive acceptance in substance" invites some flexible judicial construction, the provision is still a relatively straightforward formal rule that leaves the common-law rigors of contract formation intact. The document that the court finds to be the offer forms the touchstone for determin-

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110 N.E. at 621-22. In defense of the decision, one can argue that the buyer did not think the prompt acknowledgment of its order a mere technicality, because the tenor of the preprinted language is that the seller must bear the risk of the goods being delayed. If the seller had acknowledged this document and the shipment had been delayed, the buyer might have asserted a right to collect damages more easily than it could have if the document had lacked this language.

In any event, the conventional view is that 2-207 was essentially designed to reverse *Poel*. See, e.g., J. White & R. Summers, *supra* note 6, § 1-2, at 25. See also Rev. Unif. Sales Act § 20 comment 1 (Mimeo Draft Feb. 1948). One of the ironies of 2-207 is that it is not clear that it would have produced a different result in the *Poel* case. Given the court's interpretation of the document, the correctness of the decision under 2-207 turns on the credence given to expressly conditional language. Whether *any* expressly conditional language prevents a contract from being formed, regardless of how visible it is to the ordinary reader, is a question left open to a court interpreting 2-207(1). Dean Murray implies that expressly conditional language is ineffective unless conspicuous. Murray, *supra* note 4, at 637-38. Although most courts now would probably refuse to treat the language in *Poel* as "expressly conditional," some have given effect to other expressly conditional language appearing in fine print. See, e.g., *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977). Moreover, the artificiality of the result in *Poel* stems not only from the mirror-image rule, but also from the court's belief that it had to find all the relevant terms of the bargain in writing to satisfy the statute of frauds. 216 N.Y. at 324, 110 N.E. at 623. The Code's statute of frauds, contained in section 2-201, might itself have made *Poel* a different case.

<sup>53</sup> National Conference of Commissioners on Uniform State Laws, Revised Uniform Sales Act: Report and Second Draft, Alt. § 3-H (2d Draft 1941).

<sup>54</sup> This article does not assert that this RUSA section was a particularly good rule. Had it been enacted, the courts might have discovered almost as many ambiguities in it as they have found in 2-207.

ing the substance of the promises that the parties exchanged. Differences over such matters as warranty provisions prevent an acknowledgment from being an acceptance, even if such differences are buried in fine print that no one reads.<sup>55</sup>

Thus, the goal of correcting the excesses of the common-law courts in applying the mirror-image rule does not satisfactorily explain the creation of 2-207. Section 2-207 may have been designed for a bolder purpose than simply overturning a common-law rule whose flaws now appear largely academic. The drafters may have intended not simply to replace a particular rule, but to change the fundamental instruments of the law of contract formation from rules to standards.

## II. 2-207 AS RULE AND STANDARD

### A. *The Approach of the Drafters*

The chief innovation of 2-207 is not its change in the mirror-image rule, but its abandonment of the very principle of a formal rule of offer and acceptance. In place of a formal rule, the section substitutes a general standard under which the court is to look to the gist of the parties' communications to determine if they have formed a contract. In so doing, the court is to overlook any express terms in those communications that do not fairly reflect the parties' agreement.

The drafters carried out this innovation by a deceptively simple analogy. They appear to have intended in 2-207 to treat the battle of the forms in the same way that they treated an exchange of forms in which certain elements of the contract are left unaddressed by the parties. In this latter instance, the buyer sends a purchase order requesting ten units of a certain product; although the seller's acknowledgment agrees to send the ten units, neither party mentions the price of the goods or the time of delivery. The Code's solution to this problem, contained in section 2-204(3), is a good example of a statutory standard, as opposed to a rule:

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<sup>55</sup> The comment to the section notes that "[w]here terms are changed in a purported acceptance, the absence of agreement is patent. But where further terms are suggested, and especially where such terms go to arrangements for facilitating performance, the better case-law has tended strongly to read them according to the section." National Conference of Commissioners on Uniform State Laws, *supra* note 53, Alt. § 3-H comment.

Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.<sup>56</sup>

If 2-204(3) applies, the court will supply the missing terms by referring to certain "off-the-rack" terms of the Code, which themselves are generally open-ended standards rather than rules,<sup>57</sup> or by referring to the custom and usage of the parties or their trade.<sup>58</sup> Thus, under 2-204(3), the incompleteness of the exchanged forms is no bar to finding a bargain. The essential innovation of the drafters of 2-207 is to treat documents that conflict over terms of the bargain in the same way that they treat documents that are silent on essential terms.

A brief look at 2-207 demonstrates this change. Subsection (1) at first may not seem to be a great departure from the original RUSA provision on offer and acceptance. Nonetheless, the reference to

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<sup>56</sup> U.C.C. § 2-204(3) (1978).

At common law, parties were not allowed to leave essential details, such as price, unresolved. The Code removes this obstacle when a reasonable means of supplying the missing terms exists. *Id.* The virtue of this rule is that it frees parties from the burden of negotiating all of the details of their transaction. Normally, parties can resolve the details they initially leave unsettled as the need arises. The cases in which they cannot are sufficiently rare that parties are willing to accept the risk that they may have to litigate. That the parties do not find it in their interest to settle all details at the start is itself a powerful reason for not forcing them to do so. Commercial parties can fend for themselves. Nevertheless, the rule allows parties to shift the costs of settling the terms of their contract to the courts.

Whether the incentives that off-the-rack rules give to parties to avoid negotiation, when it would be cheaper for them to settle on terms in advance, are sufficient to justify limiting their use is beyond the scope of this paper. The benefits of off-the-rack terms, however, still could be retained without creating disincentives to negotiation, if parties to litigation fully bore the costs of going to court or if off-the-rack rules were clear enough so that no party would have an incentive to litigate.

<sup>57</sup> See, e.g., U.C.C. § 2-305(1) (1978) (price to be a "reasonable price" where not specifically established by contract); *id.* § 2-309(1) (requiring that "[t]he time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time"). Another off-the-rack term, the implied warranty of merchantability, may appear to be a "rule," because it is automatically inferred by law where the seller is a merchant of goods of the kind sold. *Id.* § 2-314(1). Yet the substantive content of the warranty in a particular case is determined under extremely general "standard" language. See *id.* § 2-314(2). The Code, in effect, also contains an off-the-rack "rule" rejecting arbitration provisions simply because it never provides for them. A court could nevertheless infer an arbitration clause from the customs and usage of the trade or from the parties' course of dealing. *Id.* § 1-205. Cf. *id.* § 2-208.

<sup>58</sup> *Id.* § 1-205 (course of dealing and usage of trade). Cf. *id.* § 2-208 (course of performance or practical construction).

“different” as well as “additional” terms is vital. In contrast to pre-Code law, it is not necessary under 2-207 for the parties to speak in relative harmony in order to form a contract. Equally important is the provision in subsection (2) that, between merchants, “immaterial” additions in the acknowledgment become part of the contract unless the other party objects. The obvious inference is that a “material” addition, though it does not become part of the contract, nevertheless does not prevent a contract from being formed. This provision marks a dramatic change from traditional rules of offer and acceptance. Nothing in the earlier RUSA rule on offer and acceptance suggested that additional terms in an acknowledgment could do anything more than propose to fine-tune an offer, if the acknowledgment was to remain an acceptance. The additional term could suggest a delivery date if the offer was vague or silent on that point, but the additional term could not materially alter the offer, by adding a disclaimer of warranties for instance, without destroying the agreement.<sup>59</sup>

The drafters decided that, when parties communicate with documents after dickering explicitly over some terms and relegating others to fine print, the court can act essentially as it does in the case of harmonious but incomplete documents: it can find a contract and invoke an open-ended provision of the Code or the customs and usage of the parties or trade to supply the terms on which the parties failed to agree. As Professor Hawkland suggests,

The approach of the Code in section 2-207, in effect, is to say: “The parties have entered into a deal; they have made a contract of sorts, and we will try to make a fair contract out of it.” Maybe, in doing this, terms are imposed on the parties that they do not really like, but, on balance, a better result is achieved doing this than would be achieved if the whole thing were thrown out the window.<sup>60</sup>

Neither Hawkland nor other commentators have squarely recognized, however, that the Code’s approach only *approximates* the parties’ intent. The commentators therefore fail to appreciate fully the boldness of this approach. In battles of the forms, one has no way of knowing if the parties have in fact intended to enter into a

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<sup>59</sup> Such a disclaimer, of course, would not destroy the agreement if the court finds that the term is in fact a proposal for a change.

<sup>60</sup> Hawkland, *supra* note 6, at 85.



binding contract regardless of any asymmetry in particular terms. It is not only difficult to gather the facts needed to determine whether the parties intended to contract; it is impossible, because by the very nature of battles of the forms the parties never reflected whether they were legally bound despite differences in terms. Indeed, the premise of a battle of the forms is that the parties are not aware that the terms conflict until a dispute arises, and the dispute may not arise until well after performance.

### *B. 2-207 as a Rule for Confirmations*

The Code's imperfect analogy between cases involving missing terms and those involving a battle of the forms illuminates the most troublesome question about 2-207. If the draftsmen wanted to treat battles of the forms in the same way that they treated exchanges of harmonious but incomplete documents, they might simply have relied on 2-207(1) and 2-207(3). Why did they introduce the difficulties of 2-207(2) when, as a result, the final text of 2-207 captures the draftsmen's general goal only very inartfully?

Though 2-207 covers the first kind of battle of the forms rather straightforwardly, its infamous subsection (2) presents serious problems in resolving disputes of the second kind. The problems, amply noted by the commentators, are several: Why does 2-207 address only the problem of "additional terms"? Are "different" terms meant to be included under the aegis of "additional terms"? Although comment 3 suggests that subsection (2) covers different as well as additional terms, the drafting history of 2-207 provides contrary evidence in that the word "different" was at one time inserted into subsection (2) and later dropped.<sup>61</sup> Yet even the answer

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<sup>61</sup> Whether the drafters intended "different" terms to be treated like "additional" terms in subsection (2) is unclear. In a May 1951 meeting discussing the Proposed Final Draft No. 2, it was proposed that "different" be added to *both* subsection (1) and subsection (2). The motion carried. See Transcript of Proceedings of the Annual Meeting of the American Law Institute in Joint Session with the National Conference of Commissioners on Uniform State Laws 27-28 (May 16-18, 1951) [hereinafter cited as Transcript]. Karl Llewellyn added the words "or different" after "additional" in subsection (2) in the copy of the Code he used at the meeting and noted that the change had been adopted. The Karl Llewellyn Papers, J.XIII.1.a (available in University of Chicago Law School Library). The same amendment appeared in American Law Institute & National Conference of Commissioners on Uniform State Laws, U.C.C., May Meeting Revisions to Proposed Final Draft No. 2, at 6 (June 1951). However, the November 1951 Final Text Edition and the 1952 Official Draft did not include this alteration to subsection (2).

to this question does not explain how "different" terms should be treated. If they are part of subsection (2), are different terms always "material" and therefore merely proposals for modifying the contract? If subsection (2) is silent on the treatment of different terms, what part of 2-207 or what other section of the Code does one turn to? Do the different terms simply drop out and the offeror's terms govern? Or may courts resort to the gap-filler provisions of the Code for the term on which the documents of the parties differ?<sup>62</sup>

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Llewellyn's initial response to the proposal that "different" be added to both subsections (1) and (2) may suggest what led to the decision to drop "different" in subsection (2) after it had been adopted:

My trouble with the "or different from" proposition is that I had construed subsection (2) as meaning that when you attempted to put in terms at odds with those that the other party had already said it wanted, you had a notification in advance of objections to the terms you were trying to put in.

Transcript, *supra*, at 27. Llewellyn seems to suggest that "different" terms could never become part of the contract, even if they were nonmaterial, because of subsection 2(a). The word "different" would thus be redundant. Llewellyn withdrew his objection after Soia Mentschikoff made the following observation:

As I read sub (2) with the addition of the language, the additional or different terms are to be construed as proposals for addition unless notification of objection to them is given within a reasonable time. Well, if the seller has sent a form which says four days [as the amount of time allowed for inspection] and the buyer sends a form which says ten days, it is perfectly clear to me that each of them is objecting to the term period indicated by the other, and therefore after [sic] that term, you have no agreement. But Mr. Buerger's basic point, that nonetheless you have a contract and that the battle of forms gets resolved on what is the essential nature of the contract, which is the agreement to buy or sell the quantity of goods at the price indicated at the time to be delivered, means that the contract remains. I do not think the worries that beset Mr. Llewellyn are real as to that.

*Id.* at 28. Mentschikoff's remarks, however, only argue for including "different" in subsection (1), not for including them in subsection (2), in which they would be "proposals." She seems to suggest that when there is no agreement on a particular term, neither party's term controls. It is possible that the drafters recognized this between the May meeting and the November draft and took "different" out of subsection (2) for this reason. If this is true, off-the-rack terms should govern whenever there are different terms.

<sup>62</sup> This is the approach advocated by Professor White (though rejected by Professor Summers). See *J. White & R. Summers*, *supra* note 6, § 1-2, at 28-30. The approach was adopted by the court in *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F. Supp. 1404 (S.D.N.Y. 1975). See also *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 428-29, 237 N.W.2d 488, 489 (1975) (following this approach, but appearing to rely on subsection (3), which by its terms does not apply when the forms create a contract under subsection (1)). This argument may have been rejected in *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 927 (9th Cir. 1979). Two other courts have held that "different" terms are to be treated like "additional" terms. See *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 527 (Mo. Ct. App. 1981); *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 102-03 n.5,

More fundamentally, when is an "additional" term not a "different" term?<sup>63</sup> When parties reach an explicit agreement, but leave some terms unsettled, the Code supplies the missing terms. An offer includes not only the terms it addresses explicitly, but also the off-the-rack terms that the Code supplies to fill in any gaps. An unequivocal acceptance of such an offer is an acceptance of both explicit and implicit terms. A term in an "expression of acceptance" might simply repeat a term implicit in the offer because of the off-the-rack term the Code supplies.<sup>64</sup> But when is a term that is not redundant in this way anything other than a "different," rather than an "additional" term?<sup>65</sup> Any term that does not repeat what was implicit or explicit in the offer appears to depart from the offer, rather than supplement it, and therefore seems to be a "different" term.<sup>66</sup> Finally, what is an "immaterial" addition? When is it anything more than a term that the Code would supply and is therefore already implicit in the offer—and therefore, strictly speaking, not "additional" at all?

Although some of these difficulties may have been inadvertent, and no specific expression of legislative intent may exist to resolve them, we can better understand their source if we view them in light of the dual function of 2-207 and the distinction between standards and rules. For reasons that remain obscure,<sup>67</sup> the drafters wanted to make a single statutory provision work for both contract formation and contract confirmation.<sup>68</sup> They created a chan-

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569 P.2d 751, 759 n.5, 141 Cal. Rptr. 157, 165 n.5 (1977). But see *supra* note 61.

<sup>63</sup> See *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 211-12, 206 N.W.2d 414, 423-24 (1973). The difficulty of distinguishing "additional" and "different" is addressed in 3 R. Duesenberg & L. King, *supra* note 6, § 3.03[1].

<sup>64</sup> For example, when a seller's form makes no mention of warranty, the buyer might have a clause in its form that seller warrants the goods to be merchantable. This clause is in some sense an "additional" term. Yet it does not "add" anything to the bargain because, in the absence of any mention by the parties, the Code assumes that the seller warrants its goods as merchantable. U.C.C. § 2-314 (1978).

<sup>65</sup> For example, a seller frequently tries to disclaim the implied warranties of merchantability. See, e.g., *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 14 (S.D.N.Y. 1973); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d at 207, 206 N.W. 2d at 421. These disclaimers would seem to be "different" rather than "additional" terms.

<sup>66</sup> See 3 R. Duesenberg & L. King, *supra* note 6, § 3.03[1].

<sup>67</sup> See J. White & R. Summers, *supra* note 6, § 1-2, at 35.

<sup>68</sup> See U.C.C. § 2-207 comment 1 (1978). For a thorough discussion of how courts should apply 2-207 to confirmation cases, see Murray, *supra* note 4, at 614-18 n.56.

neling rule appropriate to confirmations and then grafted that rule onto the 2-207 *standard* for the battle of the forms.

In an earlier effort, the drafters of RUSA had recognized the frequently excessive costs that parties face in fine-tuning an oral agreement through writing. The parties may not care greatly whether delivery is to be in 90 or 105 days, but they nevertheless wish to settle the matter in advance. Similarly, it may not matter very much which party insures the goods while they are in transit, but it does matter that the question be settled before performance. The drafters of RUSA had recognized, however, that the cost of fine-tuning the agreement over such matters in writing was often very high. RUSA therefore contained a purportedly straightforward rule which is an example of a channeling rule that aims at resolving such matters through a single confirming letter. The rule simply stated that the terms in the confirming letter sent by either party are binding, unless the terms effect any material change in the oral agreement, or the party receiving the letter makes a timely objection.<sup>69</sup>

In later versions of RUSA, the drafters combined this section on confirming letters with the section altering the mirror-image rule to produce a direct forebear of 2-207:

Where either a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time

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<sup>69</sup> The relevant section reads in full:

Alternative Section 3-I. *Confirmations Containing New Terms.* (new to Sales Act)

(1) This section applies between merchants where a contract has been concluded orally or by wire, and a letter of confirmation contains additional language proposed for inclusion in the agreement, or treated in the letter as being included.

(2) In the absence of express objection by the other party within a reasonable time after his receipt of the letter, the additional language shall be construed as included in the agreement if it satisfies the following conditions—

(a) If it is of a character reasonably connected with the agreement; and

(b) If it does not unreasonably depart from the provisions of law which would otherwise govern; and

(c) If it does not negate or unduly modify the particularized terms of the agreement as made; and

(d) If it is so placed and printed as reasonably to force attention from the addressee.

(3) If there is express objection by the addressee within a reasonable time, or if the language does not meet the requirements laid down in subsection 2, the original contract stands as made, and the additional language operates only as an offer to modify it.

National Conference of Commissioners on Uniform State Laws, *supra* note 53, Alt. § 3-I.

states terms additional to those offered or agreed upon

- (a) the additional terms are to be construed as proposals for modification or addition; and
- (b) between merchants the additional terms become part of the contract unless they materially alter it or notice of objection to them is given within a reasonable time after they are received.<sup>70</sup>

Thus, subsection (2) of 2-207 is a relic of a channeling rule created not for battles of the forms, but for confirming letters.

Some of the problems in applying 2-207(2) to battles of the forms result from a flaw inherent in this channeling rule. In trying to ensure that the rule did not allow a party sending a document to take unfair advantage of the party receiving it, the drafters introduced troublesome unpredictability into a rule for which predictability was essential: in every case the question turns on whether a particular term is "material." The channeling rule the drafters created for confirming letters is supposed to give the party receiving the document an incentive to read it, by putting him on notice that, unless he objects, he will be bound by its terms. The more broadly the meaning of "material" is defined, however, the less the chance that the recipient will be bound, and therefore the less the incentive for the recipient to read the document.

Regardless of the inherent virtues or vices of the channeling rule, its use in the battle of the forms context is unfortunate. Theoretically at least, the rule contradicts the standard that the drafters of 2-207 intended for battle of the forms cases—that conflicting forms be treated like consistent but incomplete documents. Having declared in subsection (1) that conflicts or asymmetries in the fine print of the two forms do not alone preclude the finding of a contract, 2-207 rather arbitrarily imposes the fine-print term of one of the parties on the other, at least where the failure of agreement lies in an additional rather than a different term. The language of the section therefore continues to dignify the sort of legal formality that presumably had been the bane of the common law. The difference is that where the mirror-image rule imposed the terms of the last document, 2-207 imposes the terms of the first. In addition, the section's reference to expressly conditional language appears to

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<sup>70</sup> American Law Institute & National Conference of Commissioners on Uniform State Laws, Code of Commercial Law, art. II, § 20 (1948) (Revised Uniform Sales Act).

allow parties to opt out of the present rule altogether on the basis of yet another fine-print term.<sup>71</sup>

Although 2-207 addresses the major flaw that has been perceived in the mirror-image rule—the ability of welschers to use fine-print terms to escape a contract—it does not satisfactorily address the problem of determining which fine-print terms govern a transaction once a court finds that the forms do indeed create a contract. If the statute is to treat exchanges of conflicting documents and exchanges of harmonious but incomplete documents in the same way, one would expect the fine-print terms to cancel each other out. Before concluding that 2-207 must be revised to carry out the drafters intended rejection of the formal rule approach, however, one must examine how the courts have interpreted the section.

### C. *The Approach of the Courts*

In the first type of battle of the forms—the case in which a dispute arises before performance as to whether a contract exists at all—the success of 2-207 is readily apparent. Courts might have interpreted 2-207(1) so as to preserve common-law notions of offer and acceptance, thus inviting frequent litigation over the meaning of an “expressly conditional” acknowledgment. For example, courts might have held that differences over warranty, price, or quantity are so inherently substantial that their existence, even in fine print, prevents an acknowledgment from being an “expression of acceptance.” By and large, however, courts have followed the intent of the drafters and have found binding contracts whenever conflicting terms are stated in part of the preprinted language that was not the subject of prior dickering.<sup>72</sup> In the first type of the battle of the forms, then, 2-207 has been successful both in the sense that it has reduced litigation and in the sense that the courts have faithfully followed the drafters’ intent to replace a common-law rule with a statutory standard.

With respect to the second type of dispute in battle of the forms cases—disputes over which contract terms are to control following performance—the judicial success of 2-207 is less clear. In subsection (2), the courts have had to grapple with a channeling rule

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<sup>71</sup> See *supra* notes 16-18 and accompanying text.

<sup>72</sup> See *supra* note 1.

flawed in itself—because it lacks the formal certainty that is the very purpose of a rule—and in any event misapplied to battles of the forms. Yet the remarkable thing is that the courts, using their ability to bend troublesome statutory language to fit commercial reality, have managed to apply 2-207 in a manner substantially faithful to the drafters' essential purpose.

Although litigation over the meaning of "material" has been frequent, such litigation takes a predictable course. Courts nearly always find clauses in the acknowledgment form to be "material," unless those clauses would be read into the contract in any event because of trade usage or course of dealing.<sup>73</sup> Courts appear to find "material" any clause worth litigating. In time, one would expect litigation to decrease, as the likely outcome of litigation becomes clear.

From the face of subsection (2), the result of a finding of materiality seems to be that the terms in the offeror's form govern the transaction. Thus, it appears that 2-207 has substituted a first-shot rule for the common law's last-shot rule. As we noted above, such an approach is inconsistent with the idea that battles of the forms should be treated like cases in which parties have agreed in principle to do business with one another, but have remained silent as to some of the terms of the transaction.

An examination of court decisions under 2-207, however, does not compel the conclusion that the section has, in practice, created a first-shot rule. The striking aspect of this litigation to date has

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<sup>73</sup> See *supra* note 2. Materiality is often left as a question of fact. Yet the courts have established some guidelines. For example, there has been extensive litigation in New York on the materiality of particular arbitration clauses, but recently the New York Court of Appeals suggested that all arbitration clauses are material. See *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 334, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 414 (1978). A later case, however, suggested that despite *Marlene*, an arbitration clause might be non-material if it were part of the usage of trade. See *Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 5-6, 399 N.E.2d 1154, 1155-56, 424 N.Y.S.2d 133, 135 (1979). One early case suggested that a warranty disclaimer might be nonmaterial. See *J.A. Maurer, Inc. v. Singer Co.*, 7 U.C.C. Rep. Serv. (Callaghan) 110, 111 (N.Y. Sup. Ct. 1970). Nonetheless, recent cases have held otherwise. See, e.g., *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 528 (Mo. Ct. App. 1981). Terms that might at first glance appear material usually enter the contract because of a prior course of dealing or usage of trade. See, e.g., *Oskey Gasoline & Oil Co. v. OKC Ref. Inc.*, 364 F. Supp. 1137 (D. Minn. 1973) (buyer adds handwritten term that amount of gasoline delivered be measured in terms of "gross gallonage," which was about 2% more than the alternative "net gallonage" measure; former measure held adopted by the parties through trade usage and prior dealing).

been that the terms that bind the parties are usually held to be those that the Code would have supplied had the parties' forms been completely silent. In effect, then, the courts resolve battle of the forms cases with the Code's off-the-rack terms rather than with a first-shot rule. The statute's apparent first-shot language permits this result in two ways. First, when parties insert clauses that condition an offer or a purported acceptance on agreement to the terms of the offer or acceptance, a court finding such language to be "expressly conditional" can supply the Code's off-the-rack terms under the aegis of subsection (3).<sup>74</sup> Second, even when neither form is expressly conditional, the first form is typically that of a buyer who sends a purchase order.<sup>75</sup> Buyers most often insert into their forms only terms that the Code would provide in any event. In the absence of any explicit agreement, the Code gives the buyer an implied warranty of merchantability and holds the seller liable for consequential damages.<sup>76</sup> Sellers rather than buyers usually seek arbitration. In such cases, it generally makes no practical difference whether the buyer's terms or the Code's off-the-rack terms control.

A few cases do arise in which the original offeror includes terms that depart from the Code's off-the-rack rules. In practice even these terms may not become part of the contract; thus we have further evidence that 2-207 has not produced a first-shot rule. In most of these cases, the term that departs from the Code—a disclaimer of warranty, for example—conflicts with one in the other party's form. Thus, a court confronts "different" terms. Two courts that addressed this question took advantage of the ambiguities in 2-207's language and did not impose the buyer's fine-print terms on the seller.<sup>77</sup> One court reasoned that section 2-207 is silent on the treatment of terms when the parties' forms conflict,

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<sup>74</sup> See, e.g., *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d at 1235-37; *Scott Brass, Inc. v. C & C Metal Prods. Corp.*, 473 F. Supp. 1124, 1129-30 (D.R.I. 1979).

<sup>75</sup> An exception is *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Hawaii 466, 468-70, 540 P.2d 978, 981 (1975), in which seller's form was the first shot and contained limitations on warranty and damage liability.

<sup>76</sup> For example, the warranty provisions in the buyer's form controlled in *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973), but the result would likely have been the same under the Code's implied warranties, see U.C.C. §§ 2-314, 2-315 (1978).

<sup>77</sup> *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F. Supp. 1404, 1406-07 (S.D.N.Y. 1975); *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. at 429-30, 237 N.W.2d at 489-90. See *supra* note 62.



because subsection (2) by its terms applies to additional terms only. The court therefore looked outside the section and held that it could turn to the Code's policy of supplying off-the-rack terms.<sup>78</sup> If this treatment of "different" terms continues, few cases will ever arise in which the terms imposed on the parties under 2-207 will differ from those that would be imposed if 2-207 is redrafted to include an express standard that cancels out fine-print terms on which the parties failed to agree and that supplies in their stead the Code's gap-fillers.

In short, 2-207 has not worked badly in practice. Although the channeling rule in subsection (2) has spawned unnecessary litigation, even these cases have been decided consistently, for the most part. The majority of courts applying 2-207 to battle of the forms cases have found enforceable contracts when forms differed only in nondickered, fine-print terms. The terms of the contract, however derived, are usually the same as those the Code would have supplied had the parties left the matter completely unsettled. Thus, whether 2-207 is a badly drafted statute is not of great concern, because courts have used it for nearly three decades in a manner consistent with the principles on which it rests. The more interesting question is whether these principles are themselves sound.

### III. THE COSTS OF RULES AND STANDARDS

The previous section of this article attempted to demonstrate that 2-207 effectively replaces an old formal rule with a new legal standard for resolving battle of the forms disputes. To say that 2-207 takes the "standard" approach, however, is not to endorse that approach. As we have emphasized, both standards and rules have their costs. In choosing an approach for a particular kind of dispute, one should ask whether the costs of one approach are more tolerable than those of the approach it is to replace. In this remaining section, we attempt to show that the standard approach itself has significant costs and that the problems attributed to the mirror-image rule have been greatly exaggerated.<sup>79</sup>

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<sup>78</sup> *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F. Supp. at 1407.

<sup>79</sup> Neither choice entails making any distinct social group of contracting parties better or worse off than another. Parties who battle with forms are merchants, and merchants are necessarily both buyers and sellers. A battle of the forms rule that favored buyers (or sellers) would seem to benefit most merchants only as much as it hurts them. An exception

*A. The Costs of 2-207*

The Code's "standard" approach does have notable virtues.<sup>80</sup> The approach does not create incentives for parties to bargain over contract terms<sup>81</sup> whose benefits are smaller than the cost of negotiating them. Perhaps parties that exchange conflicting forms could easily resolve differences in nondickered terms, if negotiation costs were low enough. Indeed, the Code's off-the-rack terms may give parties the terms they would have settled on if they had negotiated over them. A standard based on the principles of 2-207 may give parties to some transactions what they would have gotten had they spent more time and money bargaining. The standard, therefore, allows these parties to get the terms they want without the costs associated with establishing them through negotiations.

It is crucial to realize, however, that the Code's off-the-rack terms fit some parties and some transactions better than others, and that parties suffer when off-the-rack terms are imposed that are not in their interest. Where an off-the-rack provision categorically prefers a buyer to a seller or a seller to a buyer, the court may be unable to supply a term in the best interests of both parties.<sup>82</sup> Where the off-the-rack provision works as an open-ended standard, the court may fail to exercise its discretion in the parties'

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would be merchants who sell only to consumers. Their purchases, but not their sales, would be subject to a battle of the forms rule. Yet here, as elsewhere, one would expect these merchants to adjust their price terms, even if their sellers always won the battle of the forms. These merchants do not seem as a group to have substantially more or less market power than their sellers. Firms that sell to consumers come in all sizes, from Sears, Roebuck to the mom-and-pop grocery store.

<sup>80</sup> Many commentators also emphasize that using the Code's off-the-rack terms is inherently more "fair" than any rule favoring the terms in one document or the other. See, e.g., J. White & R. Summers, *supra* note 6, § 1-2, at 31 (noting that "[a]t least [an off-the-rack term] has the merit of being a term that the draftsmen considered fair"). Yet a rule that favors one party or another is not necessarily "unfair." If the rule were clear—for example, that the last form always won or that the buyer's form always won—and if the rule were common knowledge, it could not be considered "unfair" in the sense that it defeated parties' reasonable expectations. The sounder objection may be that clear but arbitrary rules are too costly for parties to bargain around. As a result, parties are saddled with terms that do not advance their self-interest.

<sup>81</sup> Some commentators regret that parties do not bargain over all the details of their deal. See, e.g., *id.* § 1-2, at 24 (noting that "[i]t is a sad fact that many sales contracts are not fully bargained"). The Code, however, recognizes that requiring the parties to dicker over all the details of a bargain is wasteful. See U.C.C. § 2-204 (1978). See also *supra* note 56.

<sup>82</sup> See *supra* note 57.

interests.<sup>83</sup>

The following example illustrates this problem. A buyer needs a glue to seal plastic bags that contain frozen vegetables. It finds a seller who is willing to provide a certain type of glue for ninety-five dollars, without any warranty. If the seller is liable for the glue's possible failure, however, it would charge five dollars more. This five dollars is for the extra precautions the seller would take. The extra payment also covers the risk that, despite its efforts, one batch of glue in a thousand will fail and cause thousands of dollars worth of vegetables to perish.

The seller should not sell its glue with a warranty if the buyer is better positioned to accept this risk. The buyer may be able to test the glue more cheaply than the seller can. The buyer, after all, knows the particular surfaces it wants the glue to bind, and the seller may be a wholesaler that does not make the glue or have any special knowledge about the glue's characteristics. The buyer may have greater knowledge of the likelihood and consequences of glue failing on frozen vegetable packages, and thus may be the cheaper bearer of the risk. The total cost of the buyer's accepting the risk of glue failure might be only three dollars instead of the five dollars for the seller. If this were the case, the buyer would prefer to buy glue at ninety-five dollars and spend three dollars more to test it and insure against unavoidable loss. This would be preferable to buying the glue with a warranty from the seller for one hundred dollars.

Both parties are worse off if the goods are sold with a warranty, but the Code presumes that merchant sellers are better positioned than buyers to bear the risk of their product failing.<sup>84</sup> The seller and buyer can negotiate out of this presumption, but such negotiations come at a cost. Indeed, as we have emphasized, a battle of the forms only arises when these negotiation costs exceed the benefits to either party. Given such costs, the buyer and the seller may be better off if seller sells the glue at one hundred dollars than if they tried to negotiate a lower price for an "as is" sale. The buyer

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<sup>83</sup> See *id.*

<sup>84</sup> U.C.C. § 2-314 (1978). In this example, the Code's off-the-rack provision essentially operates as a formal rule. In other cases, the off-the-rack provision may be a standard delegating broad discretion to the court, but the result will be the same if the court misperceives the joint interests of the parties. See *supra* note 57.

and seller will be better off living with the Code whenever the cost of negotiating is greater than two dollars, which is the difference between the cost of the glue to the buyer with a warranty (one hundred dollars) and the cost without a warranty (ninety-eight dollars). Of course, the possibility that the Code produces an inefficient result in this example does not mean that it always will. In other transactions, the seller will be better able to absorb the risk of goods failing than the buyer is, and the Code's off-the-rack provision will coincide with what the parties would have agreed to. The point, however, is that off-the-rack provisions by nature fit imperfectly; they are better tailored for some transactions than for others. The cost of off-the-rack provisions is that they supply, or allow courts to supply, inefficient terms in some cases. But many who extoll the virtue of the Code for supplying terms whenever the parties do not reach explicit agreement do not appreciate this cost.

The goal of a legal approach to the battle of the forms should be two-fold. First, it should allow parties to avoid wasteful negotiations. Second, it should encourage contracts to include the most efficient terms possible. For example, a sales contract should be subject to a warranty if and only if it is cheaper for the seller than the buyer to inspect the goods. An approach that forces the parties to negotiate all the terms of the transaction would generally achieve the second goal, but not the first. The flexible standard of 2-207, in contrast, allows parties to save negotiating costs, but at the price of the Code's gap-filler provisions which, as we have seen, may not happen to fit a particular transaction. If we can create a set of rules that allows parties to minimize negotiating costs and still get the right terms for their particular transaction we should do so. In the following discussion we show how the mirror-image rule, in theory, can achieve these goals better than a statute such as 2-207, which is based on the flexible standard approach.

### *B. The Costs and Benefits of Returning to a Rule*

Under the mirror-image rule, the fact that some parties will read forms (or the relevant parts of them) can compel the party that writes a form to include terms that take into account the special skills and needs of buyers and sellers in a particular market. This result militates against parties unilaterally favoring their own interests in form writing. The mirror-image rule, in particular, allows and encourages parties to offer terms that advance both parties'

interests, rather than risk the loss of business from those who buy or sell goods with special concern for such matters as warranties and arbitration provisions.

The mirror-image rule, unlike a standard that allows a court to supply off-the-rack terms, permits parties to tailor terms to suit their own circumstances. The major concern of this section is to overcome the chief objection to the mirror-image rule—that it invites parties to insert terms that are simply unilaterally advantageous to themselves. Initially, however, we wish to address two other objections: first, that the rule invites a prolonged battle of the forms, and second, that the rule allows parties to welsh on deals before performance.

One strong objection to a return to the mirror-image rule is that it would encourage an endless battle of the forms. Because any substantial difference between a seller's term and a buyer's makes the responding document a counteroffer accepted by shipment or acceptance of the goods, some fear that the parties will keep sending documents to each other in order to ensure that its own document arrives last. Such behavior, however, seems unlikely. If the term involved is expected to be important relative to the entire transaction, the parties can afford to dicker over it explicitly. In addition, it is unlikely that the parties will engage in a prolonged battle of the forms without reading each other's forms. Most businessmen, after all, have little interest in playing games with legal rules. Even if the parties do consider a prolonged exchange of forms, they will probably realize that by sending a new form they lose the chance to do business on the terms in the other party's form. No stratagem ensures that a particular party will be the last to send a form, and an attempt to send the last form could backfire completely. A seller or buyer might simply decide not to do business with a party that rigidly insisted on its own terms.

A second objection is that a return to the mirror-image rule would create opportunities for parties to back out of the deal by insisting that no contract had been formed, whenever they confront an unfavorable change in conditions between the exchange of forms and performance. These fears, however, may be exaggerated. Modern courts, like the pre-Code courts, could easily adopt a "de minimis" exception to the mirror-image rule and hold that the exchange of documents creates a contract despite the failure of the

documents to match each other on all terms.<sup>85</sup> In situations in which the court refuses to so hold—such as when the parties disagree over a warranty term—the absence of a binding contract may simply be the risk that parties take when they use preprinted forms containing self-interested terms.

Under the mirror-image rule, parties could limit this risk if they wanted to. If, for example, it became clear that warranty disclaimers prevented a contract from being formed until the parties performed, sellers that wanted to ensure binding contracts could include disclaimers less frequently. The buyer for its part could bind all of its sellers by routinely sending a form agreeing to all the terms in the seller's form. In addition, the law could prevent long periods in which no enforceable contract existed by a rule that would allow courts to infer agreement on a contract from the silence of a party receiving a counteroffer. Depending on the length of time permitted under the rule and on the form that it required for rejection of the counteroffer, this rule could prove preferable to 2-207.

In any event, the problem of welshing is probably not a serious one. Parties typically try to welsh on deals when the price of the goods has changed significantly between contracting and performance. Dramatic price changes usually occur with commodities such as wheat, oil, or cotton. But battle of the forms disputes that involve important contract terms in fine print, such as warranty disclaimers, typically involve manufactured goods, whose prices are less susceptible to sudden change.<sup>86</sup>

The major objection to a return to the mirror-image rule, however, is that one party—typically the buyer—is bound by the terms of the other, even though that first party is wholly unaware of those terms. This objection thus focuses on the response of the mirror-image rule to the second battle of the forms problem. We note first that the commercial concern underlying this objection probably is exaggerated. The objection has strength only if buyers typically are unaware of important preprinted terms when they enter into contracts. Merchants, however, probably do look for, and pay attention to, preprinted terms that may prove important

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<sup>85</sup> See *supra* notes 46-52 and accompanying text.

<sup>86</sup> See Schwartz, *Cure and Revocation for Quality Defects: The Utility of Bargains*, 16 B.C. Indus. & Com. L. Rev. 543, 545-46 (1975).

in the transaction, including terms, such as warranty disclaimers, that turn up so frequently as the subjects of reported battle of the forms litigation.<sup>87</sup> As the discussion below explains, even if only a minority of merchants pay attention to preprinted forms, the fears underlying this last objection to the mirror-image rule are unfounded.

We challenge the assumption that only the charity of the last party to send a form (usually the seller) constrains it in setting terms that the parties have not dickered over. This assumption suggests that all sellers and all buyers will include unilaterally advantageous terms in their own preprinted forms, thus making those forms as self-interested as possible regardless of the particular good being sold. The evidence, however, suggests otherwise. If sellers, for example, were inclined to act in such extreme apparent self-interest, they certainly could do so under the Code. Although they run the risk that their self-interested terms will directly conflict with those in the buyers' forms, the result of such a conflict under section 2-207(3) would likely be reference to the Code's off-the-rack provisions; such sellers might be willing to take the chance that they would win under those provisions. But sellers' preprinted forms under the Code have not proved uniformly self-interested. Even in the sale of consumer goods, where buyers have little chance to dicker and little skill in bargaining, the disclaimers of and limits on warranty obligations that sellers place in their preprinted forms have varied widely among different products.<sup>88</sup> Sellers do not invariably place all possible burdens on their buyers.

Under any legal rule or standard, merchants would find it impractical to make their preprinted forms completely self-inter-

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<sup>87</sup> The only recent empirical study of which the authors are aware was made in England, where the mirror-image rule appears to survive. See *supra* note 10. That study suggests that parties read at least the more important of the fine-print terms, such as warranty disclaimers. See Beale & Dugdale, *supra* note 5, at 50. Based on a survey of only 19 engineering manufacturers, the study must be regarded as merely suggestive.

<sup>88</sup> Priest, *A Theory of the Consumer Product Warranty*, 90 *Yale L.J.* 1297, 1328-46 (1981). Priest espouses what he calls the investment theory of warranty. In this view, manufacturers will tend to warrant against defects that are cheaper for them to be responsible for. Consumers will pay for warranties through higher prices. In contrast, manufacturers will not warrant against defects that are cheaper for consumers to repair, live with or prevent themselves. See *id.* at 1307-13. Alternative theories advocated by other writers are: (1) the exploitation theory, which predicts that manufacturers will limit their legal obligations as much as possible in their warranties, and (2) the signal theory, which maintains that warranty terms provide information about the product's reliability. See *id.* at 1299-1307.

ested. When a party sends back an acknowledgment form, it never knows whether the person receiving it will read the form or, at least, the important parts in it, such as disclaimers. The party who sends a form must recognize that some of those receiving it will take their business elsewhere rather than accept the preprinted terms or dicker over them. The seller must take account of these lost sales to those who read forms, just as similarly situated buyers must take account of lost purchasing opportunities. This group that reads forms need not be especially large to place an effective check on the other party. The expected gain from unilaterally advantageous form terms, even if they do not result in lost sales, may be quite small relative to the profit on the whole transaction. If the expected stakes involved in a particular term were large enough, the parties would find it in their interest to dicker over them; these terms would thus not appear in fine print at all. Moreover, if the party that generally sent the last form did write forms with unilaterally advantageous terms, the other party could take account of this fact by setting a lower price, thereby reducing the potential gain from self-interested form terms. In contrast to this small potential gain, the amount that a seller or buyer has to lose, even if it loses only a single sale or a single opportunity to buy, may be quite large.

Thus, under any legal provision, including the mirror-image rule, market forces reduce a merchant's ability to use wholly biased, preprinted forms. Indeed, the mirror-image rule, compared to other possible approaches, takes maximum advantage of these market forces. It makes printed forms matter more by encouraging or even forcing parties receiving documents to read them more carefully. The rule thereby encourages parties sending documents to make them attractive to their intended recipients.

A comparison with 2-207 illustrates this point. Even when viewed as a first-shot rule that allows the first form to govern in some battles of the forms, 2-207 does not greatly encourage parties to put attractive terms into their preprinted forms. Under 2-207, a party receiving a biased form is likely to respond with an acceptance conditional on assent to its own terms. The result will be reference to the Code's off-the-rack provisions under 2-207(3). Since the sending party might win under these provisions, the unpredictability of many of which at least makes a biased form a reasonable gamble, the sender may rightly perceive that it has little to lose



from a biased form.

Even if the last party does not make its acceptance expressly conditional, the presence of its own, different terms may still allow a court to impose off-the-rack terms. Because no party can insist on its own terms under 2-207, and because the terms a court will supply are usually those of the Code in any event, 2-207 does not give those who receive documents much of an incentive to read them. A standard that allows a court to substitute general off-the-rack terms for fine print cannot at the same time give the parties an incentive to draft forms in their mutual interest. The more the off-the-rack terms control, the less the fine print matters, both to the courts and to the parties themselves. The mirror-image rule, by contrast, enables and encourages parties to adjust the terms in their documents to the special skills and needs of buyers and sellers in their particular market, where the Code's off-the-rack provisions and the courts' application of them are not sensitive to the characteristics of that market.

Section 2-207 thus encourages the seller to make his preprinted forms self-interested, and to ignore special features of the transactions in which the forms will be used. Thus in the glue example, the seller will probably include a warranty disclaimer in its forms, regardless of which party could prevent defects in the adhesive most cheaply. If the buyer's form consistently includes a broad warranty provision, the seller might not win its disclaimer, because the court may resort to the off-the-rack implied-warranty provision in 2-314. Nevertheless, the seller has little to lose by including the disclaimer. The only danger it faces is that of offending the buyer and losing the contract, but this danger is far smaller than it would be under the mirror-image rule. The buyer of the glue, after all, will probably ignore the disclaimer, anticipating that in case of conflict the court will supply the 2-314 warranty. The seller, for its part, might even hope to gain by its disclaimer, gambling that if the court does supply the 2-314 warranty, it will also use its broad discretion under 2-314(2) to qualify the warranty in the seller's favor. In any event, the result will be unsatisfactory if 2-314 supplies a warranty where the mutual economic interests of the parties dictate otherwise.

Under the mirror-image rule, in contrast, the seller has a strong incentive to moderate the warranty term in its form to reflect the mutual interest of the parties in that type of transaction. The

seller knows that if the buyer accepts the contract on the seller's terms, its own form will govern, and so it retains a natural incentive to make the term favorable to itself. As the seller realizes, however, the buyer *also* expects the seller's form to govern if it is the last one in the battle; the buyer will be disinclined to accept the contract on the terms in that document if those terms are too biased in the seller's favor. The seller knows that at least *some* buyers will be careful enough to read the seller's form<sup>89</sup> and that, if the form is too biased, these buyers will either take their business elsewhere<sup>90</sup> or at least respond with yet another document containing terms more in their own favor. Thus, the seller that does not moderate its self-interest in drafting its forms will lose the opportunity to deal with at least some buyers on the terms in that form. Its rational *self-interest* will therefore be to design the terms in its form in the *mutual interest* of the parties.

Under the mirror-image rule, then, each party, in designing its form for a particular type of transaction, has an incentive to hypothesize the terms that the parties would have settled upon had they dickered over them. This process produces terms that are more suitable for some transactions than are the Code's own gap-filler provisions. In the glue example, for instance, if the buyer is the party that could prevent defects in the glue more cheaply, the seller might include a disclaimer; on the other hand, if the seller is better positioned to test for defects and such is common knowledge in that market, the seller probably would include a warranty—or at least not include a disclaimer. In transactions involving other goods, where the parties would have split the responsibility for preventing losses caused by defects had they dickered, the seller might include a qualified warranty, such as one giving the buyer

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<sup>89</sup> Although it is impossible to determine the minimum proportion of buyers who must read the seller's form to constrain its terms, this proportion may be quite low. It depends on many factors, including the seller's expected gain from the particular self-interested term, how much the buyer expects to lose from doing business subject to that term, and how much the buyer's purchase is worth to the seller. It is worth noting that the buyers who are most likely to read fine-print terms may also be the seller's most valuable customers.

<sup>90</sup> Of course, in some cases the buyer cannot take his business elsewhere because the seller has a monopoly. In this case, it may be argued that the seller can impose unreasonable form terms on buyers. We note, however, that to the extent that a monopolist extracts his monopoly rent through unreasonable form terms, he may lose his ability to charge the full monopoly price. Thus, even a seller with substantial market power has an incentive to produce a form with an optimum mix of price and terms.

rights to replacement and repair but excluding consequential damages. In other cases, a seller may anticipate that arbitration would be in the mutual interest of both buyer and seller. Even though the Code does not supply an arbitration clause, the seller could supply one and include the specific provisions—such as the way arbitrators are to be chosen—that the parties would have settled upon had they negotiated such a term.

The mirror-image rule can work in this way to produce better results than the Code's off-the-rack provisions, even where these provisions are broad "reasonableness" standards rather than fixed terms. In these cases, a court using 2-207 might not exercise its discretion to supply a term that was appropriate to a particular transaction. For example, if the buyer's form insists that the seller is liable for any delay beyond the delivery date in the contract, while the seller's form disclaims any such liability, a court might look to section 2-309(1) of the Code. Under this provision, the court might settle on some "reasonable" time at which the seller would become liable. Because of the court's lack of familiarity with the parties' businesses, that time might be earlier or later than the parties would have agreed to had they had a cheap opportunity to dicker. Under the mirror-image rule, the seller would have anticipated that dickered-on date and included it in its preprinted form, balancing its desire to obtain the buyer's business against its desire to limit its liability as much as possible.

The mirror-image rule will work in the manner described above if two conditions are met. First, some minimum number of buyers must be sensitive to terms in fine print. Second, the courts must be willing and able to enforce the rule. If the rule works as described, it will produce form terms that fit the needs of parties in particular markets better than the Code's off-the-rack provisions. Thus, if these Code provisions depart significantly from merchants' interests in specific transactions, the rule will not merely be equal to an approach based on the principles of 2-207, but superior.

It is quite plausible that the first condition will be met. Recent commentary has suggested that fixed printed terms in sellers' warranties conform to buyers' preferences even in consumer transactions.<sup>91</sup> If among consumers there are enough price-sensitive and

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<sup>91</sup> See Priest, *supra* note 88; Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 638 (1979)

term-sensitive buyers to constrain the seller when the latter drafts its forms, one would be surprised to find too few such buyers among merchants, who presumably know more about what terms are important and who, on the whole, are likely to have roughly the same bargaining power as those with whom they contract.

The second condition is more troublesome. Perhaps the stubbornest doubt about the mirror-image rule stems not from the rule's content, but from the unwillingness of courts to enforce formal rules of contract formation. The cases involving the statute of frauds or the parol evidence rule illustrate how courts permit exceptions to overwhelm rules.<sup>92</sup> Common-law courts may have created enough uncertainty in their own explication of the mirror-image rule to have kept it from working.<sup>93</sup> Indeed, subsection (2) of 2-207 itself demonstrates this reluctance. In theory, it allows parties to "channel" their conduct by enabling them to fine-tune the terms of their bargain. The terms in a particular document that depart from those that the Code would supply are allowed to govern the transaction. Subsection (2), however, has hardly been a model of statutory constraint on courts, which are nearly always ready and able to find an "additional" non-Code term "material."<sup>94</sup>

If the mirror-image rule were revived, courts might find some

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(identifying the need to focus on the market as a whole, rather than on the individuals in it, to determine the effectiveness of a legal rule).

<sup>92</sup> Corbin, for example, writes that:

The statute of frauds and the "parol evidence rule" are sometimes both applied in a single case. . . . They appear to have a similar purpose, at least when we regard the latter rule as in truth a rule of admissibility; that purpose is the prevention of successful fraud and perjury. In each case, this purpose is only haltingly attained; and if attained at all it is at the expense and to the injury of many honest contractors. Both the statute and the rule may have caused more litigation than they have prevented. Both may have done more harm than good. Both have been convenient hooks on which a judge can support a decision actually reached on other grounds. Both are attempts to determine justice and the truth by a mechanistic device, alike evidencing a distrust of the capacity of courts and juries to weigh human credibility. And both alike have forced the courts, in the effort to prevent them from doing gross injustice to honest men, to make numerous exceptions and fine distinctions, with such resulting complexity and inconsistency that a reasoned statement of their operation requires volumes instead of pages and the case must be rare in which a plausible argument can not be made for deciding either way.

3 A. Corbin, *Contracts* § 575, at 380 (1950).

<sup>93</sup> See *supra* note 46 and accompanying text.

<sup>94</sup> See *supra* note 73 and accompanying text.

similar avenue to reject a party's terms that they considered unfair. For example, a court might characterize an acknowledgment form as an "acceptance" rather than a "counteroffer," whose additional and different terms were mere "proposals." Of course, as we have noted earlier, the courts should be willing to overlook small variations in a party's form in order to prevent exploitation of the mirror-image rule by welshers. There is some danger that the courts may not develop a clear boundary between those variations that show that a contract has been formed and those that do not. The absence of such a boundary might create enough uncertainty that parties at the margin would lack an adequate incentive to read the forms they received. The mirror-image rule will not work unless the courts as well as the parties can distinguish between acceptances with minor variations—in which case the original offer sets the contract's terms—and genuine counteroffers—in which case the terms of the second document control. This uncertainty is most likely to be a problem in situations in which the parties exchange more than one document.

Even if these doubts about judicial willingness and ability to enforce the rule counsel against reintroducing it in its original breadth, courts could enforce a slightly narrower version. Under 2-207, neither seller nor buyer can impose its terms on the transaction in the event of performance. Yet it might be possible to create a rule that gave one party the power to impose its own terms on the transaction. Under such a rule, that favored party would still be held in check when it drafts its terms because of the power of those who read the form to take their business elsewhere. The goal of such a modification would be to increase judicial willingness to impose one party's terms, not by creating exceptions to the rule, but by reducing the potential for its abuse. A modified mirror-image rule could do this by ensuring that forms were written in a way that attracted the attention of all who gave forms even a cursory glance. Consider the following proposal:

#### *LEGENDED ACCEPTANCE*

A merchant seller may respond to a merchant buyer's offer with a writing that bears the legend: "WARNING: Seller will only contract on the basis of the terms set forth in this document and no other. Acceptance of the goods constitutes acceptance of the terms set forth on this document."

This document must be sent 10 days before the goods are

shipped. The legend must be conspicuous, it must be in at least 16-point type, and it must be in a color different from the rest of the document. If the seller employs such a document and the goods are delivered and accepted, a contract shall exist and the terms in the seller's legended acceptance shall constitute the terms of the contract.

A form dictated by this rule would bring attention to itself, making it more likely that marginal buyers would read it.<sup>95</sup> Under this rule, if a seller tried to impose a package of price and terms less attractive than that of its competitors, it would lose the business of such buyers. Thus, a mirror-image rule in the form of a legended-acceptance rule might be more readily enforced by the courts and thereby overcome an important practical objection to the mirror-image rule itself.

#### IV. CONCLUSION

Commentators have subjected 2-207 to sharp scrutiny, lamenting the inelegance with which the drafters designed their solution to the battle of the forms and the numerous difficulties which 2-207 appears to have caused. We have argued that most of this commentary misses the point. Underlying the concededly unfortunate language of 2-207 is the drafters' relatively straightforward desire to replace formal rules of offer and acceptance, which defer to the written expressions of the parties, with open-textured standards, under which the courts search for the fairly achieved bargain of the parties. If one accepts the drafters' purpose, the actual case law under 2-207 leaves little to quibble about. We have argued, however, that an equally compelling question about 2-207 concerns not the means by which the drafters fulfilled their purpose, but the wisdom of the purpose itself. The drafters of 2-207, like the modern commentators, have too easily dismissed the usefulness of formal rules such as the statute of frauds, the parol evidence rule, and the mirror-image rule. Though their concern with fairness in bar-

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<sup>95</sup> One should note that a seller that used such a form today would probably not enjoy the benefit of having its own terms. A court would find that the seller's "acknowledgment" was a seasonable expression of acceptance with proposals for additions that the buyer never accepted, in which case the buyer's terms would control under 2-207(2). Alternatively, a court might find that the writings did not form a contract, in which case off-the-rack terms would control under 2-207(3). It is not likely that a court would find such a form a counter-offer that the buyer accepted by performance. See *supra* note 17.

gaining seems itself uncontroversial, it often leads to superficial analysis of the way in which the legal principles governing commercial transactions can aid or hinder merchants. A system of commercial law works best when it makes it easy for merchants to design the contract terms suited to their needs and when it assures them that the terms they draft will prove binding. Formal rules, we believe, despite their poor repute in the judicial history of commercial law, may achieve these goals far better than the conventional wisdom has recognized.